[Cite as *Eslich v. Sentry Ins.*, 2004-Ohio-616.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BRANDON ESLICH, ET AL

Plaintiffs-Appellees

-vs-

SENTRY INSURANCE, ET AL

Defendants-Appellants

JUDGES:
: Hon: W. Scott Gwin, P.J.
: Hon: Julie A. Edwards, J.
: Hon: John F. Boggins, J.
:
:
: Case No. 2003CA00195
:
:
: OPINION

CHARACTER OF PROCEEDING:	Civil appeal from the Stark County Court of Common Pleas, Case No. 2002CV03242
JUDGMENT:	Reversed and Final Judgment Entered
DATE OF JUDGMENT ENTRY:	February 9, 2004

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
BOBBIE L. MARSH 303 Granger Bldg. 111 Second Street N.W. Canton, OH 44702	PETER C. MUNGER KEI J. WATKINS Ste 400, 626 Madison Avenue Toledo, OH 43604

Gwin, P.J.

{¶1} Defendant Sentry Insurance appeals a summary judgment of the Court of Common Pleas of Stark County, Ohio, entered in favor of plaintiffs/appellees Brandon Eslich and Michelle and Dennis Miller. Appellants assign four errors to the trial court:

{¶2} "BY FINDING AND ENTERING JUDGMENT THAT THE POLICY ISSUED BY APPELLANT SENTRY TO APPELLANT SENTRY CONSTITUTED AN INSURANCE POLICY SUBJECT TO R.C. 3937.18 AS OPPOSED TO SELF-INSURANCE, AND FURTHER FINDING THAT IT PROVIDED ANY SOURCE OF RECOVERY FOR APPELLEES HEREIN.

{¶3} "BY FINDING AND ENTERING ITS JUDGMENT THAT THE POLICY ISSUED BY APPELLANT SENTRY PROVIDED A SOURCE OF RECOVERY FOR APPELLEES HEREIN, DESPITE THE LIMITATIONS OF ANY SUCH COVERAGE TO COVERED AUTOS AND POLICY EXCLUSIONS WHICH PRECLUDE APPELLEES' CLAIMS.

{¶4} "BY RENDERING ITS JUDGMENT THAT THE POLICY ISSUED BY APPELLANT SENTRY PROVIDED A SOURCE OF RECOVERY FOR APPELLEES HEREIN WITHOUT REGARD TO THE $100,000 DEDUCTIBLE WHICH IS SPECIFICALLY APPLICABLE TO UN/UNDERINSURED MOTORISTS COVERAGES BY THE TERMS OF THE DEDUCTIBLE ENDORSEMENT.

{¶5} "BY RENDERING ITS JUDGMENT AND FINDING THAT OHIO LAW APPLIES TO THE POLICY AND PROVIDES A SOURCE OF RECOVERY FOR APPELLEES HEREIN."

{¶6} The facts which gave rise to this case are undisputed. On November 4, 1999, Brandon Eslich was involved in an automobile collision with the alleged tort feasor, Michael Johnson, who is not a party to this appeal. At the time of the accident, Eslich was seventeen years old and resided with his mother and step-father. Brandon's mother owned the Ford Probe he was driving at the time of the collision.

{¶7} Erie Insurance Group insured Brandon and his mother under two personal auto policies.

{¶8} Eslich and his parents brought suit against the alleged tortfeasor, Erie Insurance Group, and various insurance companies which insured the employers of Brandon, his mother, and his step-father.

{¶9} The trial court entered summary judgment in favor of Brandon and his family against Erie, and found Erie's coverage was primary, subject to any set-offs of the tortfeasor.

{¶10} Eslich's other claims were made pursuant to *Scott-Pontzer v. Liberty Mutual Fire Insurance Company* (1999), 85 Ohio St. 3d 660 710 N.E. 2d 1116, and *Ezawa v. Yasuda Fire & Marine Insurance Company* (1999), 86 Ohio St. 3d 557, 715 N.E. 2d 1142. Brandon Eslich was employed by Burlington Coat Factory and Advanced Auto Parts. Royal Indemnity Insurance Company insured Burlington Coat Factory with a business auto policy and a commercial general liability policy. The trial court found Brandon Eslich was entitled to UM/UIM coverage under the business auto policy, but not under the commercial general liability policy. Royal also insured Advanced Auto Parts, and the trial court found Brandon Eslich was entitled to UM/UIM coverage under the business auto policy, but not under the commercial general liability policy.

{¶11} Brandon Eslich's mother, Michelle Miller, was employed by the Jackson Local School District. Nationwide Agribusiness Insurance Company insured the Jackson Local School District under an education liability policy and an education umbrella policy. Indiana Insurance Company insured the Jackson Local School District under a commercial auto policy with an uninsured/underinsured motorist endorsement. The trial court found *Scott-Pontzer,* and its progeny applied to school boards, and the school board's authority to purchase UM/UIM coverage has no bearing on determining the scope of coverage under any policies the Board may have had in place at the time of the collision. The trial court concluded Brandon Eslich and his parents are entitled to UM/UIM coverage under the Indiana Insurance Policy and under Nationwide's umbrella policy. The trial court found the educational liability policy is not a motor vehicle policy of insurance, and for this reason, Brandon Eslich and his parents were not entitled to any coverage under that policy.

{¶12} Brandon Eslich's step-father, Dennis Miller, was employed by Sentry Insurance, who was insured by Sentry under a commercial auto policy with express UM/UIM coverage. The trial court found Brandon Eslich and his parents were covered under the Sentry policy.

{¶13} The trial court found Erie Insurance, as the personal auto insurance carrier for Brandon Eslich and his parents was primary, and subject only to the tortfeasor's setoff. The trial court found that amongst the various other insurance companies, each was obligated on pro-rata basis, after the primary coverage and the tortfeasor setoff.

{¶14} Four separate appeals were taken from this judgment, Stark Appellate Nos. 2003CA00200; 2003CA00207; 2003CA00195, and 2003CA00205. All are related

and present similar issues, but for the purposes of clarity, each appeal will be addressed separately.

{¶15} The trial court found *Scott-Pontzer*, *supra,* and *Ezawa, supra* afforded coverage to Brandon Eslich and his parents for the accident. During the pendency of the appeal, the Ohio Supreme Court decided the case of *Westfield Insurance Company v. Galatis,* 100 Ohio St. 3d 216, 2003-Ohio-5849. In *Galatis,* the Supreme Court limited the holding in *Scott-Pontzer* to situations where an employee is injured within the course and scope of his employment at the time his claim arises. The Supreme Court overruled the *Ezawa* case.

{¶16} We find none of the plaintiffs were within the course and scope of their employment at the time they suffered their injuries, and for this reason, the *Galatis* opinion requires reversal of the trial court's judgment.

{¶17} The second assignment of error is sustained. The balance of appellant's assignments of error are overruled as moot.

{¶18} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is reversed, and pursuant to App. R. 12, final judgment is hereby entered in favor of Sentry Insurance.

By Gwin, P.J.,

Edwards, J., and

Boggins, J., concur